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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

THOMAS H. CASEY,)
)
Petitioner,)
)
v.)
)
THE UNITED STATES,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether the United States Court of Claims erroneously granted summary judgment in favor of the United States denying the petitioner damages for loss of wages and other economic benefits even though such damages were directly caused by representations and actions of employees of the United States acting within the scope and course of their employment, especially since the Court of Claims found that the offer of continued employment was never withdrawn.

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2. THE COURT OF CLIAMS ERRED IN HOLDING THAT THE PETITIONER IS BARRED FROM RECOVERY BECAUSE HE WAS INELIGIBLE FOR PERMANENT EMPLOYMENT DUE TO HIS ADVANCED AGE, COMPLETELY IGNORING THE PROVISIONS FOR "TEMPORARY LIMITED EMPLOYMENT" IN EFFECT AT THE TIME.

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OPINION BELOW

The opinion of the United States Court of Claims appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under §1255 of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1491:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or

upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or

executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

STATEMENT OF THE CASE

The petitioner is a United States citizen, was born on April 30, 1904, and was engaged in the private practice of law in New York State prior to October 29, 1974. He applied for a position as an Administrative Law Judge with the Bureau of Hearings and Appeals of the Social Security Administration (SSA). Mr. Casey was found qualified and took the oath of office on October 29, 1974.

Prior to accepting the appointment and taking the oath of office, the petitioner discussed the position with Burton G. Goodyear in Arlington, Virginia, because petitioner never intended to leave his New York practice and move to a strange city at his own expense merely for temporary employment. At that time Mr. Goodyear was the acting head of personnel for the Bureau of Hearings and Appeals. Mr. Goodyear informed the petitioner that, since he was over the age of seventy at the time he would be entering

federal government service, he (the petitioner) would be retained as a federal government employee for a minimum of five years in order to become eligible for retirement benefits. The petitioner relied upon this commitment in deciding to take the oath of office, relocate from New York State, and give up the private practice of law.

Petitioner performed his work as an Administrative Law Judge in a professional and thoroughly competent manner. He received step pay increases and was twice reappointed to continue hearing black-lung disability cases.

On or about June 13, 1975, the petitioner received a letter from the Bureau of Hearings and Appeals over the signature of Robert L. Trachtenberg, stating that if he desired to be appointed to a GS-13 Hearing Examiner position at the expiration of his temporary black-lung position, he should submit a Standard Form-171 to the Hearings

Examiner Branch so that a qualification determination could be made. The letter contained the phrase, "Now that your next position within the BHA has been confirmed." The form was included with the letter. The petitioner mailed his completed Standard Form-171 in as required on June 24, 1975.

Mr. Casey, after submitting Standard Form-171, received an undated letter from Robert L. Trachtenberg addressed to him with a Standard Form-50 dated 11-28-75 attached to it. The Trachtenberg letter informed the petitioner that "upon the expiration of this appointment, you will be converted to the position of Hearing Examiner, GS-905-13, in the location designated by this Office."

On February 18 and 19, 1976, petitioner was sent by the Bureau of Hearings and Appeals to a training conference in Atlanta, Georgia, having received an invitation to attend the training session for SSI cases from Regional Chief Administrative Law Judge

Frank B. Borowiec. The petitioner was informed that he was being sent for the purpose of preparing him to function as a Hearing Examiner.

On December 23, 1976, Judge Casey received a letter notifying him that his appointment as an Administrative Law Judge would terminate effective December 31, 1976--only one week's notice. He received no indication at any time that the decision to convert him to the position of Hearing Examiner had been altered or withdrawn. Petitioner then attempted to appeal and grieve his termination, but his efforts were to no avail. Petitioner originally filed suit on September 1, 1977 in the United States District Court for the Middle District of North Carolina, alleging age discrimination under 29 U.S.C. 621 et seq. and procedural and substantive due process violations in the agency's failure to extend his appointment. By Order of November 6, 1978,

the District Court granted defendant's motion to dismiss the age discrimination claim and transferred the present claim to the United States Court of Claims pursuant to 28 U.S.C. 1406(c). The District Court stayed its order transferring the case pending petitioner's appeal to the Court of Appeals for the Fourth Circuit. The United States Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal of the age discrimination claim in a decision dated January 15, 1980. The matter was then removed to the United States Court of Claims.

The government moved for summary judgment. The Court of Claims, while accepting as true the petitioner's representations as set forth above, found in favor of the government and entered an order awarding summary judgment to the United States. The petitioner, in timely fashion, has submitted this petition for writ of certiorari.

Judge Casey, the petitioner, relied upon the following representations made by employees of the government all acting within the scope of their employment:

1. The statement of Burton J. Goodyear, Personnel Officer of the BHA that, since the petitioner was entering Federal employment after the age of 70, he would be retained for a minimum of five years to qualify for retirement benefits;

2. A letter of Robert L. Trachtenberg ordering the petitioner to file the enclosed Form-171 for employment as a hearing examiner;

3. The fact that the petitioner was sent to Atlanta for the express purpose of being trained to handle SSI cases;

4. The letter of Robert L. Trachtenburg stating that after the expiration of the petitioner's latest temporary appointment, he would be converted to the position of Hearing Examiner.

As a result of the foregoing representations, petitioner rested secure that he would remain as a Federal employee. Thus, the receipt of a notification on December 23, 1976, that he was terminated effective December 31, 1976, giving one week's notice of termination, was so stunning a shock as to constitute cruel and inhumane treatment.

Petitioner, after having been repeatedly assured of continued employment, was cast adrift without warning and without the opportunity to plan for his future.

REASONS FOR GRANTING THE WRIT

1. ACTIONS AND REPRESENTATIONS BY AGENTS OF THE GOVERNMENT ACTING WITHIN THE SCOPE AND COURSE OF THEIR EMPLOYMENT AND UPON WHICH THE PETITIONER RELIED TO HIS DETRIMENT REQUIRE THAT THE GOVERNMENT BE ESTOPPED FROM PROFITING BY ITS OWN FABRICATIONS AND MISCONDUCT.

For over two years, the petitioner served the United States as an Administrative Law Judge. He held an appointment which was routinely and periodically renewed. Prior to accepting the appointment and taking the oath of office, the petitioner was induced to leave the private practice of law in his home state where he was admitted to practice by assurances from the acting personnel director of the Bureau of Hearings and Appeals that he would be able to remain in government service for five years, in order to qualify for retirement benefits.

Once the petitioner had assumed office and relocated at his own expense to a state where he was not admitted to practice law, he received repeated assurances that his

continued employment as an Administrative Law Judge was secure. He was ordered to complete paperwork to facilitate his conversion to an SSI Hearing Examiner, he was trained to assume such a position, and he was notified by the Director of the Bureau of Hearings and Appeals who had full authority to effect the conversion that it would take place at the expiration of his extended term as an Administrative Law Judge hearing black lung cases. This notice of conversion was never resended or withdrawn, as the Court of Claims acknowledged in its opinion.

The Court of Claims reiterated the general rule in cases of government employment, finding that the petitioner had no automatic right to an extension of his appointment nor an automatic right to appointment as an SSI Hearing Examiner. It relied on the holding of this Court in Arnett v. Kennedy, 416 U.S. 134 (1974) and on its own opinions in Manuel Williams v.

United States, Ct. Cl. No. 564-81C (June 18, 1982), and Haqan v. United States, 671 F.2d 1302 (1982).

Petitioner acknowledges the holdings in these and other cases concerning employment with the Federal Government. The Court of Claims, however, attempts to afford the government as an employer an arbitrary and absolute protection which is offensive to the very concepts of equity and fairness upon which our rule of law is grounded.

The government has never contended that the petitioner inadequately performed his duties. Instead, the government admitted before the Court of Claims that the Bureau of Hearings and Appeals made a "mistake" in misleading the petitioner. As a result of the repeated oral and written misrepresentations made to him, the petitioner lost both continued income and also pension and retirement benefits. Because he relied upon the representations of governmental officials to

his detriment, the petitioner has invoked the doctrine of estoppel to block the government's asserted defenses.

Equity requires that the government be estopped. The Court of Claims has held that the doctrine of equitable estoppel may be invoked to prevent a party from profiting by his own fabrications and misconduct when the other party has detrimentally relied upon them. Steuer v. United States, 207 Ct. Cl. 282 (1975). It is clear that the doctrine may be invoked against the government. Such a step is proper when a government employee acting within the course and scope of his employment pursues such action as naturally would and actually did mislead another to the other's prejudice. Branch Banking Co. v. United States, 98 F. Supp. 757, 120 Ct. Cl. 72 (1951), Cert. denied 342 U.S. 893.

The petitioner exhausted his administrative remedies prior to litigation. In

so doing, he met the standard of exhaustion set forth in Athas v. United States, 597 F.2d 722 (Ct. Cl. 1979). See also, Hagarty v. United States, 449 F. 2d 352, 196 Ct. Cl. 66 (1971).

While the petitioner has sought reinstatement and back pay as compensation, the Court may, in the alternative, order an award of monetary damages in an amount to be determined upon further hearing before the Court of Claims. Whatever the most appropriate remedy in the eyes of this Court, it is clear that the government profited from the services of the petitioner and the wealth of experience and maturity of judgment he brought with him to his position as an Administrative Law Judge. To permit the government to escape responsibility for the misrepresentations of its employees concerning continued employment would cause not only damage to the petitioner but also would give a green light to government agen-

cies to similarly mislead and cause inuury to other citizens in the future.

2. THE COURT OF CLAIMS ERRED IN HOLDING THAT THE PETITIONER IS BARRED FROM RECOVERY BECAUSE HE WAS INELIGIBLE FOR PERMANENT APPOINTMENT DUE TO HIS ADVANCED AGE, COMPLETELY IGNORING THE PROVISIONS FOR "TEMPORARY LIMITED EMPLOYMENT" IN EFFECT AT THE TIME.

The Court of Claims seeks to further relieve the government from any responsibility to the petitioner by asserting that, since the petitioner was 70 years of age when he first became an Administrative Law Judge in 1974, he was not eligible for permanent appointment under the legislation in existence at that time. Significantly the very statutes and regulations identified by the government in support of this contension are those which would have permitted the Director of the Burear of Hearings and Appeals to have insured the continued employment of the petitioner through continued temporary appointments of up to a year's duration each.

As an attachment to its brief and support of the motion for summary judgment before the Court of Claims, the government included portions of the Federal Personnel Manual in effect prior to the time when individuals over the age 70 could be given permanent employment. Sub-chapter 4 defines the terms and circumstances of "Temporary Limited Employment." Such appointments were permitted for specific periods of time not to exceed one year in length and there was no bar to continuing reappointments. Section 4-5 specifically addresses the issue of employment of persons over the age of 70:

> Limitation on tenure of appointees 70 or older. Regardless of the type of appointment which would have been applicable if he/she were under 70 years of age, a person entering duty on or after his/her 70th birthday is given temporary limited appointment. This is in compliance with 5 U.S.C. 3322. This requirement does not apply to any person appointed to a scientific or pro-

> fessional position established under 5 U.S.C. 3104, or a comparable statute (see sub-chapter 10 of chapter 300), or to any employee already in the Federal service who is appointed without a break in service of one work day unless he/she was first appointed on or after his/her 70th birthday. Agencies at their option may extend for additional periods of one year or less, temporary limited appointments of persons over 70 who receive these appointments lieu of another type appointment.

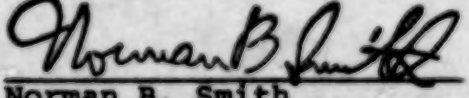
The Government at no time has asserted that Robert L. Trachtenberg lacked the authority to appoint the petitioner to a position as an Administrative Law Judge or hearing examiner within the Bureau of Hearings and Appeals of the Social Security Administration. In fact, it is the contention of the petitioner that Mr. Trachtenberg (1) had the authority to appoint the petitioner to continued service with the Bureau of Hearings and Appeals, and (2) exercise that power when he ordered the petitioner to file Form-171 and subse-

quently notified the petitioner that at the end of his present temporary appointment he would be "converted" to a hearing examiner with the Bureau.

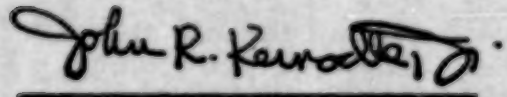
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,



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October 12, 1982

IN THE UNITED STATES COURT OF CLAIMS

No. 73-80C

THOMAS H. CASEY	) Civilian pay; expiration of temporary appointment as ALJ; no claim in this court for pay of position not held or to which not appointed; estoppel inapplicable where representations not authorized.
v.	)
THE UNITED STATES	)

ORDER

Plaintiff, Thomas H. Casey, was employed by the office of Hearings and Appeals (formerly the Bureau of Hearings and Appeals) of the Social Security Administration as a temporary administrative law judge for consecutive appointments from October 29, 1974, through December 31, 1976. At the time of his first such appointment, he was 70 years old and had previously engaged in private practice. During his tenure, he was stationed at Greensboro, North Carolina, and adjudicated only Title II (black lung) claims. His tenure expired on December 31,

1976, and he was not extended after that date, nor was he appointed a supplemental security income (SSI) hearing examiner to adjudicate claims in addition to black lung cases. Asserting age discrimination against him and due process violations in the failure to extend his appointment or to appoint him an SSI examiner, plaintiff sued in the United States District Court for the Middle District of North Carolina. The age discrimination claim was dismissed by the District Court[1] and the alleged due process violations were transferred to this court. Defendant has moved for summary judgment. Plaintiff opposes that motion but does not himself move for summary judgment.

For the purposes of the Government's motion, we assume the truth of plaintiff's

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1 The Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal of the age discrimination claim.

representations that (a) prior to his becoming a temporary administrative law judge in October, 1974, he was informed by the then Acting or Deputy Personnel Director of the Bureau of Hearings and Appeals[2] that, since plaintiff was over 70 years old at the time he entered federal service, he would be retained as a government employee for a minimum of five years in order to become eligible for retirement benefits; (b) plaintiff relied on this assurance in deciding to become a federal employee and to give up private practice; (c) in June, 1975, he received a letter from the Bureau of Hearings and Appeals directing him to file an application to become an SSI examiner, and he did; (d) in February, 1976, he was sent by the Bureau to a training conference and was told that he was being sent for the purposes of preparing

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2 This person is now dead.

him to hear other social security proceedings in addition to black lung cases; and (3) a high official of the Social Security Administration (the Director of the Bureau of Hearings and Appeals) wrote to him (prior to March 31, 1976) saying that his appointment as a temporary administrative law judge had been extended and on expiration of that appointment (December 31, 1976) he would be converted to the position of hearing examiner (a statement which was never withdrawn).

Nevertheless, we must hold that plaintiff has no case. The only rights to federal employment are those conferred by legislation or regulation. Arnett v. Kennedy, 416 U.S. 134 (1974). Plaintiff no longer alleges any procedural violation and it is plain that his termination on December 31, 1976, was procedurally correct. That termination also followed the governing statutes (Public Laws 93-305, June 8, 1974, and 94-32, June 12, 1975) which allowed the Social Security

Administration to appoint temporary administrative law judges for black lung cases (which had been piling up in great numbers) and specified the dates by which such appointments would end. Plaintiff's appointment was allowed to terminate on December 31, 1976, without extension because the Administration no longer had need for his services as a temporary black lung ALJ.[3] This was in full accord with the letter and spirit of the statutes which did not call for reappointment or extension after the expiration of plaintiff's then term. See, e.g., Mittapali v. United States, Ct. Cl. No. 417-80C (Order of October 9, 1981); Yeghiayan v. United States, 227 Ct. Cl. ____, ____, 649 F.2d 847, 851 (1981).

Plaintiff's failure to be appointed an

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3 Black lung cases were to be transferred from the Social Security Administration to the Department of Labor, and it was expected that the Administration would have a decreasing need for these temporary ALJs.

SSI examiner likewise does not found any claim we can enforce. Nothing is clearer than that an individual has no right to the pay of a federal position that he has never held and to which he has not been appointed. See, e.g., Manuel Williams v. United States, Ct. Cl. No. 564-81C (Order of June 18, 1982); Hagan v. United States, 229 Ct. Cl. _____, 671 F.2d 1302 (1982). It is immaterial that plaintiff was asked to apply for the SSI position or that a high SSA official wrote to him that, on the expiration of his temporary ALJ position, he would be converted to a hearing examiner. However expanded the concept of an actual "appointment" may be, those indications of future intention to appoint could not be considered an actual, present appointment--any more than a President's indication of an intention to nominate someone for federal office is the equivalent of a nomination.

As for the representations that plaintiff invokes, they cannot, even if true, ground a claim here. A major obstacle is the undeniable fact that plaintiff was 70 when he first became an ALJ in 1974, and the then legislation (a) did not allow persons over 70 to be granted permanent federal employment, and (b) the statutes authorizing temporary ALJs for black lung cases specifically limited those appointments not to exceed one year and envisaged continuation of that program only as long as it was needed. No federal official (including the Director of the Bureau of Hearings and Appeals and the Acting or Deputy Personnel Officer for the Bureau of Hearings and Appeals) was authorized to make commitments or representations in violation of those Congressional requirements. See, e.g., Schweiker v. Hansen, 450 U.S. 785 (1981). Plaintiff was simply ineligible in 1976-1977 for permanent federal employment

either as an administrative law judge or as a hearing examiner.

For these reasons, and without oral argument, defendant's motion for summary judgment is granted, and the petition is dismissed.

BY THE COURT

Oscar H. Davis
Judge

July 16, 1982